FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 12 1940
CHARLES ELMORE CROPLEY
CLERK

No. 12

In the Supreme Court of the United States

OCTOBER TERM, 1940

UNITED STATES OF AMERICA, PETITIONER

v.

APPALACHIAN ELECTRIC POWER COMPANY, RESPONDENT

BRIEF ON BEHALF OF STATES OF:

ALABAMA
ARIZONA
CALIFORNIA
COLORADO
CONNECTICUT
DELAWARE
FLORIDA
IDAHO
ILLINOIS
IOWA
KANSAS
KENTUCKY
LOUISIANA
MAINE
MARYLAND
MASSACHUSETTS
MICHIGAN
MINNESOTA
MISSOURI
MISSISSIPPI
NEBRASKA
NEVADA
NEW HAMPSHIRE
NEW JERSEY
NEW MEXICO
NEW YORK
NORTH CAROLINA
NORTH DAKOTA
OHIO
OREGON
PENNSYLVANIA
RHODE ISLAND
SOUTH DAKOTA
TENNESSEE
UTAH
VERMONT
VIRGINIA
WASHINGTON
WYOMING

AS AMICI CURIAE.

TABLE OF CONTENTS

	PAGE
I. STATEMENT	2
II. QUESTIONS OF LAW INVOLVED	3
III. INTERESTS OF THE STATES	4
IV. THE FACTUAL ISSUES AND THEIR LEGAL ASPECTS	5
(a) The Issues	5
(b) Criteria of Navigable Waters	6
V. LIMITATIONS ON FEDERAL CONTROL OF POWER DEVELOPMENTS LOCATED IN NON-NAVIGABLE STREAMS	8
A. Source and Extent of Federal Power in Respect of Navigability in Interstate Commerce	8
B. Federal Government Has No Jurisdiction Over Non-Navigable Waters Per Se	10
C. Beneficial Effect on Navigable Capacity of No Significance	13
D. Limitations on Federal Control Where a Project on a Non-Navigable Stream Adversely Affects a Navigable Water of the United States	14
E. License Conditions	15
VI. LIMITATIONS ON FEDERAL CONTROL OF POWER DEVELOPMENTS LOCATED IN NAVIGABLE STREAMS	21
A. Federal Power to Protect Navigable Streams by Prohibiting Erection of Structures Therein Does Not Include Power to Exact Extraneous Conditions as a Consideration for Permitting the Erection of Such Structures	21
B. License Conditions	24
VII. PETITIONER ATTEMPTS TO ACCOMPLISH THROUGH THE COURTS WHAT SHOULD BE ACCOMPLISHED ONLY BY AMENDMENT OF THE FEDERAL CONSTITUTION	25
VIII. SIGNIFICANCE OF THE LEGAL ISSUES IN THE NEW RIVER CASE IN RELATION TO THE POWERS OF THE STATES AND THEIR CONTROL OVER THEIR INTERNAL RESOURCES IN GENERAL	28

TABLE OF CASES

	Page
Brewer-Elliott Oil & Gas Co. v. *United States*, 260 U. S. 77	7
California Oregon Power Co. v. *Beaver Portland Cement Co.*, 295 U. S. 142	13
Daniel Ball, The, 10 Wall. 557	6, 7
Electric Bond & Share Co. v. *Commission*, 303 U. S. 419	19
Frost Trucking Co. v. *R. R. Commission*, 271 U. S. 583	22
First Employer's Liability Case, 207 U. S. 463	22
Gibbons v. *Ogden*, 9 Wheaton 1	9
Gilman v. *Philadelphia*, 3 Wall. 713	9
Helvering v. *Davis*, 301 U. S. 619	25
Kansas v. *Colorado*, 206 U. S. 46	24
Labor Board v. *Jones & Laughlin*, 301 U. S. 1	14
Leovy v. *United States*, 177 U. S. 621	7, 8
Linder v. *United States*, 268 U. S. 5	23
McGuinn v. *High Point*, 217 N. C. 449	5, 20
Montello, The, 20 Wall. 430	6
Port of Seattle v. *Oregon & Washington R. Co.*, 255 U. S. 56	14, 24
The Daniel Ball, 10 Wall. 557	6, 7
The Montello, 20 Wall. 430	6
United States v. *Appalachian Electric Power Co.*, 23 F. Supp. 83; 107 F. (2d) 769	5, 21
United States v. *Coombs*, 12 Pet. 72	9
United States v. *Cress*, 243 U. S. 316	6
United States v. *Holt State Bank*, 270 U. S. 49	7
United States v. *Lowden*, 308 U. S. 225	23
United States v. *Oregon*, 295 U. S. 1	7
United States v. *Rio Grande D. & I. Co.*, 174 U. S. 690	6, 9, 10, 11, 12, 13
United States v. *River Rouge Improvement Co.*, 269 U. S. 411	14, 24
United States v. *Utah*, 283 U. S. 64	7
Wisconsin v. *Illinois*, 278 U. S. 367	24
Yadkin County v. *High Point*, 217 N. C. 462	5

CONSTITUTION AND STATUTES

	Page
Constitution of the United States	20, 25, 27
Art. I, Sec. 8, cl. 3	7, 8, 9, 23, 28
10th Amendment	4
Public Utility Act of 1935—	
Sec. 4a	19
Sec. 5	19
Rivers and Harbors Act of 1899	2, 4, 27
Sec. 9	2, 21
Sec. 10	2
United States Code—	
Title 16, Sec. 803(a)	16
Title 16, Sec. 803(c)	16
Title 16, Sec. 803(d)	16
Title 16, Sec. 803(e)	16
Title 16, Sec. 803(f)	17
Title 16, Sec. 807	17
Title 16, Sec. 812	17
Water Power Act	2, 4, 14, 20, 21, 24
Sec. 14	17, 18
Sec. 19	17

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 12

UNITED STATES OF AMERICA, PETITIONER

v.

APPALACHIAN ELECTRIC POWER COMPANY, RESPONDENT

BRIEF ON BEHALF OF STATES OF:

ALABAMA	NEBRASKA
ARIZONA	NEVADA
CALIFORNIA	NEW HAMPSHIRE
COLORADO	NEW JERSEY
CONNECTICUT	NEW MEXICO
DELAWARE	NEW YORK
FLORIDA	NORTH CAROLINA
IDAHO	NORTH DAKOTA
ILLINOIS	OHIO
IOWA	OREGON
KANSAS	PENNSYLVANIA
KENTUCKY	RHODE ISLAND
LOUISIANA	SOUTH DAKOTA
MAINE	TENNESSEE
MARYLAND	UTAH
MASSACHUSETTS	VERMONT
MICHIGAN	VIRGINIA
MINNESOTA	WASHINGTON
MISSOURI	WYOMING
MISSISSIPPI	

AS AMICI CURIAE.

I

STATEMENT

The Federal Government, the petitioner, instituted this suit in the District Court of the United States for the Western District of Virginia in May, 1935, to enjoin Appalachian Electric Power Company, the respondent, from constructing and maintaining a water power project in the New River near Radford, Virginia, unless it procures a full-condition license from the Federal Power Commission under the Federal Water Power Act, or, in the alternative, to require the removal of the project as violative of the Rivers and Harbors Act of March 3, 1899, and the Federal Water Power Act.

The petitioner contended that the construction and operation of this project without such a Federal license was unlawful under Section 9 of the Rivers and Harbors Act of 1899, because allegedly New River was navigable in fact in interstate commerce or, if it were not navigable in fact in interstate commerce, then the construction and operation of the project was nevertheless unlawful under Section 10 of the Rivers and Harbors Act of 1899 because allegedly the construction and operation of the project would impair the navigable capacity of the Kanawha River into which New River flows, the head of navigation on the Kanawha being approximately 160 miles downstream from the project in question. It similarly contended that the construction and operation of the project without such a license violated the Federal Water Power Act because allegedly New River was navigable in fact in interstate commerce, and if not so navigable, then because allegedly the construction and operation of the project would impair the navigable capacity of the Kanawha River and thereby affect the interests of interstate commerce.

The District Court found:

(a) That New River is not a navigable water of the United States either at the site of the project or elsewhere in its course, and

(b) That the construction of the project will not obstruct the navigable capacity of the Kanawha River or any navigable waters of the United States and that the operation of the project in any normal, rational or probable method of operation will not obstruct or impair the navigable capacity of the Kanawha River or any navigable water of the United States and will not affect the interests of interstate commerce.

It entered a final decree dismissing the bill.

The Circuit Court of Appeals, 4th Circuit, after a reexamination of the evidence concurred in the findings of the District Court and affirmed the decree.

II

QUESTIONS OF LAW INVOLVED

The broad questions of law sought to be presented by petitioner have to do fundamentally with the extent of Federal jurisdiction in relation to that of the respective States. Specifically they are (1) whether the Federal Government has authority to impose any license whatsoever with respect to a water power project located on a non-navigable stream in one of the several States (and, if so, under what circumstances and how conditioned), and (2) whether, even in the case of a project located on a navigable stream, the Federal Government would have any authority to require a license containing conditions beyond those reasonably related to the protection of navigation.

There are involved further the questions as to whether (and, if so, to what extent) under the facts of this case there

are applicable either the Rivers and Harbors Act of 1899 or the Federal Water Power Act of 1920 (as amended in 1935).

III

INTERESTS OF THE STATES

It is submitted that it is a well-settled principle that, where no public land or other Federal property is involved and where the interests of navigation are not involved, the control of the use of flowing water and the rights therein of riparian owners are subject only to the laws of the several States. However, the assertion of jurisdiction by the Federal Power Commission over non-navigable streams and its attempt to impose a license and certain license conditions for water power developments thereon, and indeed its like requirements as to water power developments of navigable streams, directly challenge both that long-established principle and the rights of the States as guaranteed by the Tenth Amendment of the Constitution of the United States.

Thus, the position of the petitioner in this case is in complete and irreconcilable conflict with the constitutional powers and proprietary rights of the States in relation to the development of their own natural resources and particularly in relation to the development of their water power resources.* The States assert the full and complete right to provide, if they choose, for private development of their water power re-

---

*In fact the courts of the State of North Carolina have found that there is an "incompatibility between the *obligations assumed*" by a municipality (a subdivision of the state) as licensee, "in agreeing to abide by all of the conditions imposed in the license issued by the Federal Power Commission and its *duties* as a municipality." *Yadkin County* v. *High Point*, (April 17, 1940) 217 N. C. 462, 465; and that a municipality exceeds "its authority in applying for and accepting the license from the Federal Power Commission." *McGuinn* v. *High Point*, 217 N. C. 449, 455.

sources and to secure for themselves the benefit of the resulting tax resources. On the other hand, they assert the right, if they so elect, to take over or make such developments themselves and to secure for themselves the profits or other benefits of public development.

The position of the United States in the instant case would strike down both the right of the States to determine whether their water power resources shall be publicly or privately developed and also the right of the States to take for themselves the benefits of whichever form of development they elect to adopt.

However, it is plain that the profound significance and implications of the instant case are not limited to the relationship of the States to the control of water power development, important as that aspect is to many States, but rather may extend to the control by the States over other of their internal affairs.

IV

THE FACTUAL ISSUES AND THEIR LEGAL ASPECTS

(a) The Issues

The factual issues sought to be raised by petitioner are

(1) Whether New River is navigable in fact in interstate commerce; and

(2) Whether, if it is not navigable in fact in interstate commerce, the construction and operation of this water power project will substantially impair the navigable capacity of any navigable water of the United States.

In view of the fact that the evidence in the record, as referred to in the opinions of both courts below (23 F. Supp. 83, 89-98, 101-104; 107 F. (2d) 769, 780-788), shows that

the findings of the lower court were supported by substantial evidence, we take for granted that the findings of fact of the United States District Court, concurred in by the Circuit Court of Appeals, will not be disturbed by this Court.

(b) Criteria of Navigable Waters

Contrary to petitioner's suggestion (Petition for Writ of Certiorari, p. 16), that the courts below revised long-settled rules as to the test of navigability, it seems clear that both courts below followed the long-settled Federal test of navigability (23 F. Supp. 83, 98-100; 107 F. (2d) 769, 780).

In this connection any suggestion that the Federal Power Act definition of navigable waters could be effective to enlarge or broaden the scope of the judicial definition, prescribed by this Court, may be summarily dismissed, for Congress cannot by statutory definition or legislative fiat make navigable waters of the United States of any streams which are not actually navigable in interstate commerce in their natural state. In point is the statement of this Court in *United States* v. *Cress*, 243 U. S. 316, 322, that:

> "Many state courts, including the Court of Appeals of Kentucky, have held, also, that the legislature cannot, by simple declaration that a stream shall be a public highway, if in fact it be not navigable in its natural state, appropriate to public use the private rights therein without compensation. * * *
>
> "This Court has followed the same line of distinction."

Indeed, it is our very earnest contention that the Federal test as to what are navigable waters of the United States, as set forth in decisions of this Court in such cases as *The Daniel Ball*, 10 Wall. 557, 563; *The Montello*, 20 Wall. 430, 442; *United States* v. *Rio Grande D. & I. Co.*, 174 U. S.

690; *Leovy* v. *United States,* 177 U. S. 621; *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U. S. 77; *United States* v. *Holt State Bank,* 270 U. S. 49; *United States* v. *Utah,* 283 U. S. 64; and *United States v. Oregon,* 295 U. S. 1, is at least broad enough for the protection of any navigable capacity that is real or is useful for the purposes of interstate commerce.

Any broadening of the definition and any taking in of waters not clearly navigable according to that test can, in our view, result only in an unwarranted extension of Federal jurisdiction into what was intended to be the domain of the several States. We bear in mind that, after all, under the Commerce Clause it is only interstate and foreign *commerce* which is to be regulated by the Federal Government.

Thus, the petitioner's contention (Pet. Brief, pp. 73-76) in the instant case that an intrastate stream or lake is a navigable water of the United States merely because it has been used in carrying for a short distance by boat a commodity which was subsequently shipped over an interstate railroad, is plainly untenable. That theory would in practical effect convert every intrastate navigable water into a navigable water of the United States. The very case, viz., *The Daniel Ball,* which petitioner cites and from which it quotes in support of its contention, squarely refutes that contention. Thus waters which are capable of navigation on intrastate reaches only are at most navigable waters of a State. In order to constitute navigable waters of the United States, they must, in addition to the other requirements of the Federal test of navigability-in-fact,

> "form * * * by themselves, or by uniting with other waters, a continued highway over which commerce * * * with other States * * * is conducted by water." (10 Wall. 557, 563.)

That waters which fail to comply with the foregoing prescription are at most navigable waters of the State is made

unequivocably clear by the more complete definition from which the foregoing excerpt is taken:

> "And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." (10 Wall. 557, 563.)

The position of the States with regard to Federal jurisdiction over water power developments will be discussed, first, in relation to projects on non-navigable streams such as the case at bar, and, secondly, in relation to projects on navigable streams.

Our discussion hereinbelow proceeds on the premise that no Federal land or other Federal property is involved.

V.

LIMITATIONS ON FEDERAL CONTROL OF POWER DEVELOPMENTS LOCATED IN NON-NAVIGABLE STREAMS.

A. Source and Extent of Federal Power in Respect of Navigability in Interstate Commerce

Clearly the sole source of Federal authority over navigable waters is in the Commerce Clause of the Constitution. Thus, in referring to "navigable waters of the United States," this Court in 1900 in *Leovy* v. *United States,* 177 U. S. 621, stated at page 632:

> "The power of Congress to regulate such waters is *not expressly granted* in the Constitution, but is a power *incidental* to the express 'power to *regulate commerce* with foreign nations, and among the several States and with the Indian tribes.'" (Italics supplied.)

In this connection it is pertinent to note the several steps taken by this Court in deducing from the Commerce Clause the nature and extent of the Federal power in respect of waters navigable in interstate commerce. When this Court in 1824 in *Gibbons* v. *Ogden,* 9 Wheaton 1, held in effect that the power of Congress over *commerce* includes like power over *navigation,* it was merely giving expression to the fact that the part was comprehended within the whole. In that same case, however, Chief Justice John Marshall defined the power "to regulate" as meaning the power "to prescribe the rule by which commerce is to be governed" (p. 196). But, when in 1836 in *United States* v. *Coombs,* 12 Pet. 72, this Court held in effect that the power to *regulate* navigation (commerce) includes the power to *protect* navigation (p. 78), it did so and could do so only, we submit, by drawing an *inference.*

Again, when in 1865 in *Gilman* v. *Philadelphia,* 3 Wall. 713, this Court in effect held that Federal power under the Commerce Clause includes not merely protection of *navigation* (*commerce*) but also protection of *navigable waters* and furthermore of the *navigable capacity* of navigable waters, there were involved *further inferences.*

The need for recognizing the facts concerning, and the reasonable limits of extension of, Federal power by *inference* is even greater in the cases of *non-navigable* streams. This is the more apparent when one bears in mind, as above shown, that any Federal power over navigable streams *per se* (as distinguished from *commerce* upon such streams) exists merely by *inference.* Apparently these considerations were fully in mind when this Court in 1899 rendered its decision in *United States* v. *Rio Grande Dam & Irrigation Company,* 174 U. S. 690, and in its opinion, as pointed out hereinbelow, expressed the limitations upon Federal authority in respect of non-navigable streams.

We are prompted to suggest that, if it should be held that the Federal power in respect of navigation goes *beyond* protection of the navigable capacity of navigable waters, such a holding will have extended *beyond* the limits of reasonable inference. Obviously, each step in that direction involves corresponding curtailment of the rights, responsibilities and power of the States.

B. Federal Government Has No Jurisdiction Over Non-Navigable Waters Per Se.

There is a real and definite difference between the limitations on Federal control over projects located in navigable waters and the limitations on Federal control over projects in non-navigable waters.

Control by the Federal Government over the erection of structures outside the physical limits of navigable waters is restricted to the prevention of any impairment of the navigable capacity of a navigable water of the United States by acts done outside of those waters. Such control includes no power to prevent or regulate the erection of structures in non-navigable streams, but merely the incidental power to prevent any substantial interference with navigable capacity elsewhere.

In short, the Federal Government has no plenary power to decide whether structures in non-navigable waters may or may not be erected. *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690. Therefore the Federal Government has no power to make such a structure unlawful by reason of the fact merely that it has no Federal license or permit.

Therefore, such incidental power as the Federal Government possesses cannot be the basis of any right to require a Federal license, for the mere erection of a structure in a non-navigable stream. Instead, the Federal Government's power

with regard to such structures is limited to the right to restrain any substantial impairment of the navigable capacity of navigable waters through acts performed in the non-navigable waters.

The nature and scope of Federal power in the foregoing respects were fully discussed and the limitations thereon were clearly set forth by this Court in the *Rio Grande* case, *supra:*

> "Of course, when such proceedings are instituted it becomes a question of *fact* whether the act sought to be enjoined is one which fairly and *directly tends to obstruct* (that is, *interfere* with or *diminish)* the navigable capacity of a stream. It does not follow that the courts would be justified in sustaining *any* proceeding by the Attorney General to restrain *any* appropriation of the upper waters of a navigable stream. The question *always* is one of *fact,* whether such appropriation *substantially interferes* with the navigable capacity *within the limits* where *navigation* is a *recognized fact.*" (P. 709.) (Italics supplied.)

In the course of the opinion in that case this Court, for purpose of illustrating its thought in this connection, said:

> "The Hudson River runs within the limits of the State of New York. It is a navigable stream and a part of the navigable waters of the United States, so far at least as from Albany southward. One of the streams which flows into it and contributes to the volume of its waters is the *Croton River,* a *non-navigable stream.* Its waters are taken by the State of New York for domestic uses in the city of New York. *Unquestionably* the State of New York has a *right to appropriate* its waters, and the United States *may not question* such appropriation, unless thereby the navigability of

the *Hudson* be disturbed. On the other hand, if the State of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume of waters, which, flowing into the Hudson, make it a navigable stream, to *such an extent* as to *destroy its navigability,* undoubtedly the jurisdiction of the National Government *would arise* and its power to restrain such appropriation be unquestioned; and within the purview of this section it would become the right of the Attorney General to institute proceedings to restrain such appropriation." (P. 709.) (Italics supplied.)

The opinion shows that the inquiry of this Court in that case was addressed to the question of the extent of the Federal Government's right to interfere (p. 701). The limitation which this Court held to exist upon the Federal power to protect navigable waters from injury, by reason of acts done in non-navigable tributaries, was concisely stated in its decree. That decree did not grant an injunction against the allegedly unauthorized construction of the dam but ordered an inquiry as to

> " * * * whether the *intended acts* of the defendants in the construction of a dam and in appropriating the waters of the Rio Grande will *substantially diminish* the navigability of that stream within the *limits of present navigability,* and if so, to enter a decree restraining those acts to the extent that they will so diminish." (P. 710.) (Italics supplied.)

From the foregoing it is clear that, in the case of a project situated in a non-navigable stream, there is no power in the Federal Government to prohibit its construction merely by reason of its being so situated and that likewise there is no power to impose any license. Furthermore, it is clear that,

where there exists or will certainly exist interference with the navigable capacity of some water of the United States, the control by the Federal Government is limited to the prohibition of that actual or intended use of the project which

> "*substantially* interferes with the navigable capacity *within the limits* where navigation is a recognized fact." (Italics supplied.) (174 U. S. at 709.)

Of course, it necessarily follows that, if the foregoing be specifically applied to the instant case on the basis of the facts as found by the courts below, viz., that the project will not interfere with navigation anywhere, there is no power in the Federal Government to require a license and hence no question as to the validity of license conditions.

C. Beneficial Effect On Navigable Capacity of No Significance

The petitioner's suggestion (Pet. Brief, p. 100, 123) that even a *beneficial* effect on the navigable capacity of a navigable water of the United States, by reason of a project located on a non-navigable stream, affords a basis for Federal jurisdiction, is untenable.

Contrary to petitioner's assertion (Pet. Brief, p. 123), the *Rio Grande* decision above quoted is plainly to the effect that such control as the Federal Government has in the premises is predicated upon proof that the project will "substantially interfere with the navigable capacity" of any downstream water where navigation is a recognized fact, and is further to the effect that even in such case jurisdiction may be asserted only to the extent of the threatened diminution or interference. Thus it is clear from that case that the only effect over which the Federal Government has any control is one which is *adverse*. See also *California, Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, 158-9, which

reviews the scope and effect of the *Rio Grande* decision, and *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, 31-32.

From the foregoing it seems clear that any benefit or possibility of benefit to a navigable water of the United States by reason of a water power project located on a non-navigable stream would not afford any basis for the exercise of any Federal control in connection with such project.

D. Limitations On Federal Control Where a Project On a Non-Navigable Stream Adversely Affects a Navigable Water of the United States.

Although the facts of the instant case apparently do not bring into the foreground the limitations on Federal control where a project on a non-navigable stream adversely affects a navigable water of the United States, yet, in order to make our position clear, we consider that subject.

We believe it has been demonstrated in the foregoing that, even in such a hypothetical case of adverse effect by reason of a project in a non-navigable water, there is no power in the Federal Government to require a license for the project, but rather only a continuing right to do whatever is necessary, but only whatever is necessary, to prevent that adverse effect. Moreover, it seems manifest that, even if, contrary to our view, the Federal Government might require some license for such a project on a non-navigable stream (where there is some adverse effect upon a navigable water), the license conditions would be limited to such as are necessary to prevent interference with navigation. In other words, the conditions must have a real and substantial relation to the protection of navigation. *U. S.* v. *River Rouge Improvement Co.,* 269 U. S. 411, 419; *Port of Seattle* v. *Oregon and Washington R. Co.,* 255 U. S. 56, 63.

Any contention that the imposition of license conditions not related to the protection of navigation may be imposed by reason merely of a right to require some sort of license

or consent or, as petitioner suggests (Pet. Brief, pp. 129-131), that the power to refuse to consent carries with it the power to consent upon any condition whatsoever, is utterly without foundation. Of course, such a contention would hinge first of all upon the existence of a right which we deny, viz., a right in the Federal Government to require a license for a project in non-navigable waters. But, even if that right did exist, it would not serve to justify the attaching of conditions not relevant to the protection of navigation. Indeed, even in the case of navigable waters the admitted power of the Federal Government to require consent for the erection of structures therein affords no warrant for the imposition of irrelevant license conditions. (See pp. 21-24, *infra*.)

Under the Federal Power Act many, indeed most, of the license conditions provided for therein are mandatory (at least so far as concerns projects located in navigable waters of the United States). Such a license contains all of the conditions which the Federal Power Commission is required or considers itself authorized to impose (excepting license conditions, not here involved, relating solely to the use of public or Indian lands or dams or other Federal property). Therefore, we refer to such a license as a full-condition license. It is such a license which was tendered the respondent by the Federal Power Commission and the imposition of which is prayed for by petitioner in its bill of complaint. (See Exhibit 131, R. 2663.)

With the foregoing in mind, we examine some of those license conditions for the purpose of ascertaining whether or not they really are related to the protection of navigation.

E. License Conditions

The conditions of the full-condition license purport to give the Federal Power Commission authority of such scope that the plan of improving and developing a waterway may be

controlled for the development and utilization of water power and for other beneficial uses, *including recreational purposes* (16 U. S. C. 803—(a)). Other conditions require the licensee to maintain the project works in a condition adequate for its efficient operation in the development and transmission of power, to make necessary renewals and replacements and to establish and maintain adequate depreciation reserves for such purpose, which reserves are to be determined by the Federal Power Commission, not by the State concerned. Also the licensee is required to conform to such rules and regulations as the Commission may prescribe for the *protection of life, health and property* (16 U. S. C. 803—(c)). Can such conditions properly be said really to relate to the protection of navigation? Are they not rather invasions of the reserved power of the States?

Again, the licensee is required to establish and maintain amortization reserves out of surplus earned after the first twenty years and accumulated in excess of a specified rate of return, such reserves, in the discretion of the Commission, to be held until the termination of the license or applied from time to time in reducing the net investment. The rate of return and portion of surplus earnings to be paid into the reserves are required to be set forth in the license (16 U. S. C. 803-(d)). Thus they are determined by the Federal Power Commission, not by the respective States. Other conditions require the licensee to pay fees to the United States and provide for the expropriation to the United States of excess profits (to be determined by the Federal Power Commission, not by the States) until the respective States shall see fit to make provision to prevent excess profits or to expropriate the same to themselves (16 U. S. C. 803-(e)). Do any of these provisions really relate to the protection of navigation?

Still another condition requires a downstream licensee or any unlicensed owner benefiting by any headwater improve-

ment to reimburse a licensee of a headwater improvement for such part of the annual charges, including interest, maintenance and depreciation thereon, as the Federal Power Commission may deem equitable and to pay the Federal Government the costs, as may be determined by the Federal Power Commission, of making such determination, and to pay the United States similar charges when the latter makes any like headwater improvement (16 U. S. C. 803-(f)).

Section 19 (16 U. S. C. 812) provides for Federal Power Commission regulation of even intrastate services and rates in the immaterial event a given State has not seen fit to provide for such regulation.

Section 14 of the Act (16 U. S. C. 807) permits the Federal Government to take over the project property at the expiration of the license period upon the payment of the lesser of two amounts, the fair value or the net investment. Thus the Federal Government would by contract obtain the right to take over a power project which it does not have the constitutional authority to condemn or even to acquire or itself to construct. In effect, the Federal Government would be implemented to engage within a State in a business in excess of the Federal Government's constitutional authority.

Thus, quite aside from what appears to amount to the taking of property without just compensation, it is clear that there would be encroachment upon the sovereign power of the State. Water power development within the borders of the State would come under the jurisdiction of the Federal Power Commission or even be owned by the Federal Government. In any case such power developments would be regulated and controlled by the Federal Power Commission or the Federal Government regardless of whether the policy and plan of regulation and control were in harmony with those of the State in point.

Another outcome of the provision for the taking over of the power project property by the Federal Government

affects vitally the tax resources of the several States. In private hands, the property is subject to the full extent of the taxing power of the State, whereas when taken over by the Federal Government the property would be removed from the tax rolls of the local communities and the State, with resultant hardship upon the remaining property owners.

It is with regard to this provision of Section 14 of the Act, for the taking over of the project property by the Federal Government, that petitioner in effect proposes that this Court shall defer decision (Pet. Brief, pp. 135, 137-9). However, it is not clear why the petitioner should prefer to have decision reserved with regard to this particular license provision and not with regard to the others. Certainly it is a provision in which the States, in some cases as to the fact itself and in all cases as to the principle involved, are vitally interested and as to which they are strongly of the view that the question should be settled now.

Looking at the matter from the standpoint of the pleadings, it is patent that the petitioner is moving this Court to compel the respondent to accept a full-condition license, including this very condition regarding the right of the Federal Government to take over the property. Indeed, one of the three "Questions Presented" in the petition for the writ of certiorari is

> "Whether the licensing provisions of the Federal Power Act are constitutional * * * " (Petition, p. 2).

And petitioner makes no suggestion that the license provision regarding the taking over of the property should be treated any differently than the other license conditions. Further, in its "Reasons for Granting the Writ," petitioner stresses the questions involved in this very license condition (Petition, p. 17).

Thus, provided any license at all be necessary, the very bill of complaint and the "Questions Presented" to this Court

place this license provision, like the remaining license conditions, squarely before this Court at the present time. Indeed, to defer decision upon this very important license condition would appear to be contrary to the policy of this Court to decide all of the material issues properly before it.

Electric Bond & Share Company v. *Commission*, 303 U. S. 419, cited by petitioner (Pet. Brief, p. 138), contains nothing to the contrary of that for which we here contend. In that case there was no endeavor on the part of petitioner, through its Securities and Exchange Commission, to compel more than the filing of a mere statement of registration under the Public Utility Act of 1935 (Sections 4 (a) and 5). To be sure, it was conceivable that in due course, following the registration, that Commission might endeavor to impose conditions of that Act other than the one requiring registration. But that was purely speculative. In the present case, on the contrary, the Federal Power Commission is seeking to compel the acceptance of a license containing all of the terms and conditions of the Federal Power Act. There is nothing speculative or uncertain on that point and, we submit, the issue is properly raised as to the validity of each and every condition which petitioner now seeks to compel the respondent to accept.

It seems too obvious for argument that such conditions and provisions for acquisition of the project by the Federal Government have no relation to the protection of navigation or to any regulation of any interstate commerce conducted on navigable waters. Rather they unmistakably and egregiously encroach upon the power reserved to the States. Indeed, they point the way to further encroachments, in respect of other industries or business activities, with increasingly serious repercussions and disadvantageous effects upon the powers and the tax resources of the States. This provision, contractual in form, whereby the Federal Government is sought to be empowered to acquire a business, is plainly out-

side of Federal power under the Constitution, and is equally contrary to the fundamental policy of maintaining the sovereignty of the individual States and preserving their control over their natural resources.

The conditions cited in the foregoing by no means exhaust those to which States may properly object as involving attempted aggrandizement of Federal power and corresponding encroachment upon the reserved powers and domain of the States*—all, it is submitted, without sanction in the Constitution which binds the States into a Union.

In short, it is obvious that many of the provisions contained in the full-condition license, which, under the terms of the Federal Power Act must be imposed (at least in the case of a power project located in a navigable stream), have no such relationship to the protection of the commerce on the navigable waters of the United States as would bring them within the scope of the constitutional power of the Federal Government.

Petitioner's contention (Pet. Brief, pp. 120-121) that the Government may license a private person "as an agent for the federal purposes," to build the project upon such terms and conditions as in the opinion of Congress the public interests may require, is unsound because it is predicated upon an erroneous premise. The erroneous premise is that the Government itself could build "this very project" (Pet. Brief, pp. 120, 135). The Federal Government itself has no right to build this project which is solely a water power project, located on a non-navigable stream. Contrary to petitioner's assertion (Pet. Brief, p. 135), the Court below did not recognize any such right in the Federal Government. It was only for a *proper* Federal purpose that the Court below recognized the right of the Federal Government to acquire the project upon payment of just compensation.**

---

* With reference to the encroaching effect of certain of the license conditions see the recent case of *McGuinn* v. *High Point*, 217 N. C., 449, paragraph 5 on 453, 457.

VI

LIMITATIONS ON FEDERAL CONTROL OF POWER DEVELOPMENTS LOCATED IN NAVIGABLE STREAMS.

It is of course settled that, in the exercise of its power to protect navigation, Congress may prohibit the erection in navigable waters of the United States of any structure which it holds to constitute an obstacle to navigation. However, contrary to petitioner's assertion (Pet. Brief, p. 129, 131), the existence of such authority in Congress does not constitute or carry with it power to couple, with its needed consent, conditions which are unrelated to the protection of navigation.

A. Federal Power to Protect Navigable Streams by Prohibiting Erection of Structures Therein Does Not Include Power to Exact Extraneous Conditions as a Consideration for Permitting the Erection of Such Structures.

It is true that the Rivers and Harbors Act of 1899, Section 9 thereof, requires the consent of Congress for the placing of any structure in navigable waters, and it also seems clear that the Federal Water Power Act was intended to be the vehicle for the giving of this congressional consent. Nevertheless, and contrary to petitioner's contention, it does not follow that, as a condition of congressional consent, the Federal Government may impose a kind of a license and exact conditions which extend its powers beyond those delegated to it.

** The pertinent portion of the Court's opinion is as follows:

"If the United States wishes to acquire the property for a *proper* Federal purpose, it must pay just compensation therefor." (107 F. (2d) 769, 798.) (Italics supplied.)

To state the matter somewhat differently, neither the Federal nor a State Government may, by exacting conditions for its consent, thereby obtain for itself additional and non-constitutional powers. This principle has been recognized in various cases decided by this Court. In *Frost Trucking Co.* v. *R. R. Commission,* 271 U. S. 583, 593-4, this Court said:

> "It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that *it may not impose conditions which require the relinquishment of constitutional rights.*" (Italics supplied.)

And similarly in the *First Employers' Liability case,* 207 U. S. 463, 502-3:

> "3. It remains only to consider the contention which we have previously quoted, that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond

the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures."

No principle contrary to the foregoing is to be found in the case of *United States* v. *Lowden,* 308 U. S. 225, (cited by petitioner at page 131 of its brief). In that case, involving a railroad seeking an approval from the Interstate Commerce Commission of a proposed lease of one railroad by another company, this Court did not hold, as petitioner infers, that a condition unrelated to the protection of interstate commerce could be imposed. Rather the Court held in effect that the condition which the Interstate Commerce Commission imposed, viz., that of retirement pay to employees, did have a relation to the protection of interstate commerce, by preventing interruptions thereof through labor disputes growing out of labor grievances and by promoting "that efficiency of service which common experience teaches is advanced by the just and reasonable treatment of those who serve."

A principle equally applicable with that stated in the subcaption hereof (p. 21, *supra*) is the principle stated in *Linder* v. *United States,* 268 U. S. 5, that the exercise of one of the delegated powers of the Federal Government cannot be made the basis of clothing the Federal Government with powers reserved to the States. This Court stated that principle as follows:

"Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal Government. And

we accept as established doctrine that *any provision* of an act of Congress *ostensibly enacted under power granted* by the Constitution, *not naturally* and *reasonably adapted* to the *effective exercise* of *such power* but solely to the *achievement* of *something plainly within power reserved to the States,* is invalid and cannot be enforced." (P. 17.) (Italics supplied.)

It is clear then that the only justification for the requirement of a license on a navigable stream lies in the fact that the Federal Government has the responsibility and power of regulating interstate and foreign commerce, which language of the Commerce Clause has in turn been held to include the protection of the navigable capacity of navigable waters of the United States. This being true, it necessarily follows that the conditions which may be imposed in the license may lawfully include only those which have "a *positive* relation to the control of navigation." *United States* v. *River Rouge Improvement Co.,* 269 U. S. 411, 419. Thus any license condition, in order to be justifiable, must have a "real" and "substantial" relation to the protection of navigation or navigable capacity. *Wisconsin* v. *Illinois,* 278 U. S. 367; *Port of Seattle* v. *Oregon & Washington R. R. Co.,* 255 U. S. 56, 63; *Kansas* v. *Colorado,* 206 U. S. 46.

B. License Conditions

Our analysis of various though not all of the conditions contained in a full-condition license under the Federal Power Act has been set forth at pages 15-20, *supra,* in connection with our discussion of projects on non-navigable streams. Necessarily there is no justification for including any of those conditions in a license even for a project in navigable waters.

In order that there may be no misunderstanding, we repeat that all of our discussions under Points V and VI hereof have been predicated upon the assumption that there is involved no Federal land or any other Federal property.

VII

PETITIONER ATTEMPTS TO ACCOMPLISH THROUGH THE COURTS WHAT SHOULD BE ACCOMPLISHED ONLY BY AMENDMENT OF THE FEDERAL CONSTITUTION.

Petitioner's statements that the water power resources of the country are a "national heritage" * and that there is urgent necessity for Federal control (Pet. Brief, pp. 115-116) amount to a concession that what the Federal Power Commission desires is Federal control of *all* water power generating stations and sites. Indeed, petitioner asks boldly for control not only of navigation (to which it is entitled) and water power (to which it is not entitled, except where purely incidental), but control of all other uses of streams, including use of water for irrigation and water supply (Pet. Brief, pp. 115, 133-4).

The argument for Federal control and for central authority (Pet. Brief, pp. 116, 134) is one that should be addressed to Congress with the objective of obtaining, by amendment of the Constitution, additional grants of power from the States, not an argument that should be urged upon a court. It is elementary that no necessity can *per se* be the source of Federal power. Rather the Constitution is the source of Federal power and any additional grants of power must be obtained from the States via the route of constitutional amendment.†

Petitioner's argument (Pet. Brief, p. 134), based on the case of *Helvering v. Davis,* 301 U. S., 619, is not in point. That case involved the validity of old age pensions, the money for which was raised pursuant to the taxing power. Peti-

---

* Apparently by "national heritage" petitioner means *Federal* heritage, although why, under our dual form of government, water power sites located in the respective States should be a Federal heritage, as petitioner implies, rather than a heritage of the States, is by no means clear and certainly not conceded by us.

tioner seeks to construe the quoted language** in that case as being applicable to the commerce power. However, there is no such applicability. This Court was merely pointing out that the problem of providing for elderly persons is national in area, doing so for the purpose of showing that this particular application of the congressional power to tax and spend is for the *general* welfare, as distinguished from local or special welfare. There is no indication in the opinion that, merely because a problem is national in area, Federal power springs perforce from the existence of that fact. In short, what the Federal Government may do under one delegated power, viz., the power to tax and spend for the general welfare, is no criterion whatsoever as to what it may do under another delegated power, e.g., the commerce power.

But petitioner is not content with the seeking of control of all uses of the waters of streams. Indeed it contends (Pet. Brief, pp. 126-27) that Congress has jurisdiction over *every stream, no matter how non-navigable, so long as that stream flows across a State line.* Of course it is well recognized that Congress may not only regulate interstate commerce, but also the use of the channels of interstate commerce. It may prohibit these channels from being used for purposes that contravene the public health, morals, safety, etc. Thus, as petitioner states (Pet. Brief, pp. 126-27), Congress may prohibit interstate movement of stolen automobiles, impure foods, kidnapped persons, convict-made goods, or women for immoral purposes, or even the move-

---

† Thus, petitioner's claim (Pet. Brief, p. 116) of need for "central" i.e. Federal control of the generation of electric energy (as distinguished from its transmission in interstate commerce) is one which, in order to be validated, would require a constitutional amendment plus a congressional enabling act.

** "The problem is plainly national in area and dimensions. Moreover, laws of the separate states cannot deal with it effectively." (Pet. Brief, p. 134, from 301 U. S. 619, 644.)

ment from quarantined areas of cattle which have not been dipped. And Congress may protect the channels of interstate commerce themselves, as it has done, by the Rivers and Harbors Act of 1899, in the case of the channels of waterborne interstate commerce.*

However, contrary to petitioner's assertion, it does not follow from the foregoing that a non-navigable stream becomes subject to Federal control by reason merely of the fact that it flows across a State line. True, as petitioner states, there is in such instance an "interstate movement of waters" (Pet. Brief, p. 126), but an interstate movement of water is not commerce *per se*. Such merely interstate movement can no more be considered commerce than can the movement of a rainstorm from one State to another. Like the drops of rain, the drops of water which make up such non-navigable stream will be capable of assisting in the carriage of commerce if and when they enter a navigable stream. But, of course, the waters themselves are not commerce.

Moreover, in the case of a mere interstate movement of water, there is not involved any question of protecting interstate commerce or regulating the use of the channels of interstate commerce so as to prohibit them from serving purposes that contravene public health, morals, safety, etc. Hence there is no basis in law whatsoever for Federal control over the interstate movement of water *per se*, nor any logic in petitioner's argument (Pet. Brief, pp. 126-27).

We leave this subject with the statement that under the Constitution of the United States the only way to accomplish the things here sought to be accomplished by the petitioner is by *amendment of the Constitution*.

---

* See p. 21, *supra*.

VIII.

SIGNIFICANCE OF THE LEGAL ISSUES IN THE NEW RIVER CASE IN RELATION TO THE POWERS OF THE STATES AND THEIR CONTROL OVER THEIR INTERNAL RESOURCES IN GENERAL.

While the foregoing consideration of the scope of Federal power in relation to the reserved powers of the States has concerned itself primarily with water power development, as here involved, nevertheless we believe that the determination of the issues of law in the instant case will have a far broader significance than the determination of the relative spheres of Federal and State jurisdiction with respect merely to water power projects. We apprehend that, if what we consider as a serious encroachment upon the clearly reserved sovereignty and authority of the States be permitted with regard to the subject-matter of this case, similar encroachments upon the powers of the States and with respect to other internal resources of the States may be expected to follow.

Thus, if, where no public land of the United States is involved, the Federal Government is to be permitted under the aegis of the Commerce Clause to impose upon water power projects, especially on non-navigable streams, licenses involving conditions, such as the Federal acquisition clause, having no relation to the protection of navigation, there would seem to be no barrier in law to imposition by the Federal Government of similar licensing requirements, with like acquisition clauses, as regards other natural resources situated upon private or State lands. For example, in cases in which the product or output enters or might enter into interstate commerce, there could be validated a Federal prohibition against the operation of a private or State-owned coal

mine except on condition that the owner submit to a Federal license containing a similar provision with regard to the acquisition of the mine by the Federal Government; a Federal prohibition against the production of petroleum and natural gas, unless the owner of the oil well or gas well submit to a Federal license containing a similar provision with regard to the acquisition of the well by the Federal Government; or, indeed, a Federal prohibition of the operation of farm lands, except on condition that the owners of the farms submit to Federal licenses containing a similar provision with regard to the acquisition of the farms by the Federal Government.

In short, the same provision for Federal acquisition would be applicable to the production of minerals, phosphates for agricultural fertilizer or, indeed, any other natural resources upon private or State-owned lands. If this claimed power of acquisition of water power developments were exercised, the States and municipalities thereby manifestly would lose large tax revenues. Once taken over by the Federal Government the property would become immune from all State and local taxation. We do not suggest that these are the only implications which might reasonably follow if the Court were to acquiesce in the petitioner's contentions, but we do submit that such implications alone are sufficient to warrant the most serious reflection before this Court places its imprimatur of approval upon what we insist are fundamental and far-reaching invasions of the powers reserved to the States.

Respectfully submitted,

THOMAS S. LAWSON,
Attorney General of Alabama,
Montgomery, Alabama.

JOE CONWAY,
Attorney General of Arizona,
Phoenix, Arizona.

EARL WARREN,
Attorney General of California,
San Francisco, California.

BYRON G. ROGERS,
Attorney General of Colorado,
Denver, Colorado.

FRANCIS A. PALLOTTI,
Attorney General of Connecticut.
Hartford, Connecticut.

JAMES R. MORFORD,
Attorney General of Delaware.
Wilmington, Delaware.

GEORGE COUPER GIBBS,
Attorney General of Florida,
Tallahassee, Florida.

J. W. TAYLOR,
Attorney General of Idaho,
Boise, Idaho.

JOHN E. CASSIDY,
Attorney General of Illinois,
Springfield, Illinois.

JOHN M. RANKIN,
Attorney General of Iowa,
Des Moines, Iowa.

JAY S. PARKER,
Attorney General of Kansas,
Topeka, Kansas.

HUBERT MEREDITH,
Attorney General of Kentucky;
M. B. HOLIFIELD,
Asst. Attorney General of Kentucky,
Frankfort, Kentucky.

EUGENE STANLEY,
Attorney General of Louisiana,
Baton Rouge, Louisiana.

FRANZ E. BURKETT,
Attorney General of Maine,
Augusta, Maine.

WILLIAM C. WALSH,
Attorney General of Maryland,
Baltimore, Maryland.

PAUL A. DEVER,
Attorney General of Massachusetts,
Boston, Massachusetts.

THOMAS READ,
Attorney General of Michigan,
Lansing, Michigan.

J. A. A. BURNQUIST,
Attorney General of Minnesota,
St. Paul, Minnesota.

ROY MCKITTRICK,
Attorney General of Missouri,
Jefferson City, Missouri.

GREEK L. RICE,
Attorney General of Mississippi,
Jackson, Mississippi.

WALTER R. JOHNSON,
Attorney General of Nebraska,
Lincoln, Nebraska.

GRAY MASHBURN,
Attorney General of Nevada,
Carson City, Nevada.

THOMAS P. CHENEY,
Attorney General of New Hampshire,
Concord, New Hampshire.

DAVID T. WILENTZ,
Attorney General of New Jersey,
Trenton, New Jersey.

FILO M. SEDILLO,
Attorney General of New Mexico,
Santa Fe, New Mexico.

JOHN J. BENNETT, JR.,
Attorney General of New York;
HENRY EPSTEIN,
Solicitor General of New York,
Albany, New York.

HARRY MCMULLAN,
Attorney General of North Carolina.
Raleigh, North Carolina.

ALVIN C. STRUTZ,
Attorney General of North Dakota,
Bismarck, North Dakota.

THOMAS J. HERBERT,
Attorney General of Ohio,
Columbus, Ohio.

I. H. VAN WINKLE,
Attorney General of Oregon,
Salem, Oregon.

CLAUDE T. RENO,
Attorney General of Pennsylvania,
Harrisburg, Pennsylvania.

Louis V. Jackvony,
Attorney General of Rhode Island,
Providence, Rhode Island.

Leo A. Temmey,
Attorney General of South Dakota,
Pierre, South Dakota.

Roy H. Beeler,
Attorney General of Tennessee,
Nashville, Tennessee.

Joseph Chez,
Attorney General of Utah,
Salt Lake City, Utah.

Lawrence C. Jones,
Attorney General of Vermont,
Montpelier, Vermont.

Abram P. Staples,
Attorney General of Virginia,
Richmond, Virginia.

Smith Troy,
Attorney General of Washington,
Olympia, Washington.

Ewing T. Kerr,
Attorney General of Wyoming,
Cheyenne, Wyoming.

For the Respective Amici Curiae.

Printed By Mitchell Printing Co., Raleigh, N. C.